WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
FEBRUARY 2021

NOTICE: Due to the COVID-19 pandemic, oral arguments during January will be conducted via video/audio conferencing. The Supreme Court Hearing Room will not be open to the public. The media and public may view the proceedings live on WisconsinEye or on www.wicourts.gov.

The cases listed below originated in the following counties:

Dane
Fond du Lac
Eau Claire
Milwaukee
Sheboygan
Waukesha

MONDAY, FEBRUARY 22, 2021

9:45 a.m.	18AP2142	State v. Tavodess Matthews
10:45 a.m.	19AP488	Kemper Independence Insurance Company v. Ismet Islami

TUESDAY, FEBRUARY 23, 2021

9:45 a.m.	19AP447-CR	State v. Heather Jan VanBeek
10:45 a.m.	19AP818	Southwest Airlines Co. v. Wisconsin Department of Revenue

THURSDAY, FEBRUARY 25, 2021

9:45 a.m.	18AP960	Country Visions Cooperative v. Archer-Daniels-Midland Co.
10:45 a.m.	19AP894	Eau Claire County Department of Human Services v. S. E.

Note: The Supreme Court calendar may change between the time you receive these synopses and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. The synopses provided are not complete analyses of the issues.

WISCONSIN SUPREME COURT
February 22, 2021
9:45 a.m.

2018AP2142 State v. Tavodess Matthews

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a non-final order of the Milwaukee County Circuit Court, Judge Maxine A. White, presiding, denying Tavodess Matthews's motion for judicial substitution.

On July 27, 2018, the State filed a petition seeking an order committing Tavodess Matthews as a sexually violent person under ch. 980. The trial court then issued an ex parte order finding that the petition established probable cause that Matthews was a sexually violent person; scheduled an August 15, 2018 probable cause hearing; ordered Matthews' detention; and ordered that the probable cause hearing be held no later than ten days after Matthews' August 7, 2018 release date.

At the April 15, 2018 hearing, Matthews's counsel requested an adjournment and Matthews waived the time limits on the probable cause hearing. The State objected. The trial court subsequently accepted Matthews's waiver of time limits and adjourned the hearing until August 29, 2020.

On the morning of the August 29, 2018 hearing, Matthews filed a request for judicial substitution. Under Wis. Stat. § 801.58(1), any party may request judicial substitution within 60 days after service of a summons and complaint, and before "the hearing of any preliminary contested matters." The trial court denied the judicial substitution request as untimely and stated that at the first probable cause hearing, despite the State's objection to the adjournment, it had accepted Matthews' waiver of the time limits for the probable cause hearing, an action the trial court deemed to be a decision on a contested matter.

Matthews filed a request for the chief judge to review this decision. On September 20, 2018, the chief judge affirmed the trial court's decision, holding that because Matthews requested and received a waiver of his statutory right to a probable cause hearing within ten days of his scheduled release date, the trial court properly denied his request for judicial substitution as untimely.

Matthews appealed this non-final order, arguing that a ruling on a motion to adjourn is a procedural matter; it does not implicate the merits of the underlying case and should not bar a judicial substitution request. The Court of Appeals granted leave to appeal then affirmed. The Court of Appeals concluded that the adjournment of the April 15, 2020 hearing was a preliminary contested matter. The Court of Appeals reasoned that the trial court had to decide whether there was good cause to adjourn the hearing and whether to accept Matthews' waiver of the hearing deadline. It opined that these decisions had implications for further proceedings on the merits of the State's petition to commit Matthews as a sexually violent person. Thus, the Court of Appeals decided that the request for judicial substitution was properly dismissed as untimely.

Matthews now raises the following questions for Supreme Court review:

> Is an adjourned probable cause hearing a "preliminary contested matter" that terminates litigants' opportunity to request judicial substitution?

WISCONSIN SUPREME COURT
February 22, 2021
10:45 a.m.

2019AP488 Kemper Independence Insurance Company v. Ismet Islmai

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed a Waukesha County Circuit Court order, Judge William Domina, presiding, granting summary judgment in favor of Kemper Independence Insurance Company.

Ismet and Ydbi Islmai married in 1978 and Ismet obtained a legal separation from Ydbi in 1998. They entered into a Marital Settlement Agreement which provided that Ismet would have sole title to the house, though the parties continued to live together. In June 2013, while Ismet was vacationing in Europe, Ydbi intentionally burned down the home.

Kemper Independence Insurance Company (Kemper) insured Ismet's home at the time, along with listed automobiles and typical homeowner liability risks. The policy listed Ismet as the "Named Insured" in the declarations but also said:

> *Throughout the policy, "you" and "your" means the person shown as the "Named Insured" in the Declarations. It also means the spouse if a resident of the same household.*
>
> *2. Concealment or Fraud.*
>
> *a. Under Section I-Property Coverages, with respect to all "insureds" covered under this policy, we provide coverage to no "insureds" for loss under Section I-Property Coverages if, whether before or after a loss, an "insured" has:*
>
> *1) Concealed or misrepresented any fact upon which we rely, and that concealment or misrepresentation is material and made with intent to deceive; or*
>
> *2) Concealed or misrepresented any fact and the fact misrepresented contributes to the loss.*

Kemper started an investigation after the fire. It conducted an Examination Under Oath of both Ydbi and Ismet and both signed a document attesting that the fire was of unknown origin. Kemper then denied coverage for the loss, citing a violation of the Concealment or Fraud provision contained in the policy.

Kemper filed a lawsuit seeking a declaration of no coverage. Ismet counterclaimed. Both parties moved for summary judgment based on stipulated facts. The parties agreed Ydbi had set the fire. (By this time he had been criminally prosecuted for arson.) They agreed that Ydbi knowingly lied in his earlier statements about his involvement in and knowledge of the cause of the fire; that he did so with the intent to deceive Kemper; and that Kemper relied on his concealment and fraud to its detriment. The parties also stipulated that Ismet did not conspire with Ydbi, knew nothing about his actions, and did not engage in fraud or concealment in any of her statements to Kemper.

The circuit court order granted summary judgment in favor of Kemper. The circuit court ruled that coverage to Ismet was barred under the "concealment or fraud" condition of the Kemper policy, which provides that "no" insured has coverage if "an" insured conceals or misrepresents any fact upon which the insurer relies or which contributes to the loss.

Ismet appealed. On appeal, Ismet argued that Wis. Stat. § 631.95(2)(f) prevented Kemper from denying her coverage because Ydbi's actions were an act or pattern of domestic abuse; that in light of the fact that she and Ydbi were legally separated, Ydbi was not her "spouse" and thus not an "insured" under the policy; that Ydbi's conceded violation of the "concealment or fraud" provision in the Kemper policy should not be imputed to her because to do so would violate the public policy rationale of Hedtcke v. Sentry Insurance Co., 109 Wis. 2d 461, 326 N.W.2d 727 (1982); and that the language in the "concealment or fraud" clause is a "promissory warranty" that is subject to other policy provisions that prevent breach of a promissory warranty.

The Court of Appeals affirmed the circuit court's summary judgment ruling in favor of Kemper. The Court of Appeals focused on the specific language of the insurance policy at issue, holding that its role is to construe policy language, not rewrite the terms of an agreed upon insurance policy or announce a public policy that overturns long-established rules of insurance contract law. The appellate court conceded that its decision resulted in a loss of coverage to a person who the parties agree is an innocent insured.

Ismet seeks Supreme Court review of the following issues:

1. What degree of endangerment must exist for innocent victims of abuse to support application of the public policy limitations on insurance contracts under Wis. Stat. § 631.95(2)(f).
2. Whether the Wisconsin marital property act, Wis. Stat. § 766.01(7) and (8), which provides that a judgment of legal separation effectuates "dissolution" of marriage as a matter of law, applies to property insurance.
3. Whether the public policy of the state of Wisconsin prohibits a property insurer from denying payment to an "innocent insured" victim of arson pursuant to the seminal supreme court decision in Hedtcke v. Sentry Insurance Company, 10 Wis. 2d 461, 326 N.W.2d 727, 739 (1992).
4. Whether the language of the "Intentional Loss" clause in the subject policy, which specifically severs and preserves recovery rights under the policy to "innocent insureds," supersedes conflicting language of the "concealment or fraud" clause.
5. Whether the wording of the "concealment or fraud" clause of the subject homeowner's policy is ambiguous, when viewed in isolation.
6. Whether the superseding Wisconsin endorsement conditions E. and G. prohibit application of the "concealment or fraud" condition relied upon by Kemper to void The circuit court granted Kemper's summary judgment motion and denied Ismet's motion, resulting in a declaration of no coverage under the Kemper policy and the dismissal of Ismet's claims.

WISCONSIN SUPREME COURT
February 23, 2021
9:45 a.m.

2019AP447-CR State v. Heather VanBeek

The Wisconsin Court of Appeals, District II (headquartered in Waukesha) has certified Heather VanBeek's appeal of a judgment of conviction for possession of methamphetamine. The case arises out of the Sheboygan County Circuit Court, Judge Kent R. Hoffmann presiding.

In the early morning hours of November 12, 2017, an anonymous person reported to Sheboygan police that two people had been sitting in a truck for about an hour. Sheboygan police officer Sung Oetzel was dispatched to investigate. After ensuring there were no other trucks in the area occupied by two passengers, he parked his squad car behind the truck, turned on his spotlight, and approached the truck on foot. He did not activate the squad's red and blue emergency lights.

VanBeek was in the driver's seat. Branden Sitzberger was in the passenger seat. Through the rolled down window, Oetzel asked, "How you doing?" Oetzel identified himself and said that someone had called in to report that two people were "just sitting there" for about an hour. VanBeek said she had been waiting for Sitzberger, but disagreed that it had been that long. Sitzberger said, "Ten minutes." VanBeek said she lived in Cascade, where they were going after she picked up Sitzberger.

Oetzel said their story "sounds legit," and asked, "Could I get your guys' information for my report so that I can just get out of here? . . . [I]f I could have your photo ID . . . ." Sitzberger suggested perhaps they could just write down their names. Oetzel responded that he needed their photo identification to "compare faces." After taking their driver's licenses, Oetzel said, "Okay, I'll be right back, okay?" VanBeek responded, "All right." This initial interaction took just over one minute.

Oetzel returned to his squad and ran VanBeek's license through a records check, which showed that her license was valid and she had no warrants. Oetzel also learned that VanBeek had overdosed on drugs earlier in the year and that Sitzberger was either on probation or parole.

Oetzel called a canine officer to ask him to come to the scene. After more than five minutes had passed, Oetzel returned to the truck and asked VanBeek to confirm her driver's license information, which she did. Sitzberger confirmed that he was on probation.

Oetzel asked VanBeek how long she had been sitting in the truck. She said about one hour total, for about thirty minutes before Oetzel arrived and for a while before Sitzberger got to the truck.

Based on his training and experience, Oetzel believed people "are usually utilizing narcotics" if they are sitting in a parked vehicle for a long period of time. He asked VanBeek and Sitzberger to step out of the vehicle. They complied and stood on the sidewalk with police officers while a dog sniffed the outside of the truck. After the dog "alerted," two officers searched the inside of the truck. They found a pipe and a white crystal substance that tested positive for methamphetamine. During this entire time, Oetzel retained VanBeek's driver's license.

Oetzel later interviewed VanBeek while she was in custody at the police department. She admitted she had gone to the location where she was parked to obtain drugs from Sitzberger.

She allowed Oetzel to search her cell phone, which had messages between her and Sitzberger about buying drugs.

VanBeek was charged with one count each of possession of methamphetamine and drug paraphernalia. She moved to suppress the evidence found in her truck and her statements to police. Neither party addressed whether the encounter was consensual. Both parties assumed that the initial encounter was a seizure, and their arguments focused on whether the community caretaker doctrine and/or reasonable suspicion rendered the stop unconstitutional.

The circuit court denied VanBeek's suppression motion, concluding that Oetzel had lawfully acted as a community caretaker in initially seizing VanBeek. It also concluded that Oetzel lawfully extended the investigatory stop because he had reasonable suspicion of illegal drug activity. VanBeek pled no contest to the methamphetamine charge.

VanBeek appealed, raising two issues:

1. Was the initial seizure of VanBeek justified by either reasonable suspicion or the community caretaker function?
2. Did police have reasonable suspicion to extend the length of the initial seizure in order to utilize a police dog trained in detection of the odor of drugs?

VanBeek argues that Oetzel seized her, entitling her to Fourth Amendment protections, when he asked for and retained her driver's license and took it back to his squad car for over five minutes. She argues that no reasonable person would feel free to leave the scene under those circumstances, thus creating the seizure. While the State agrees there was no reasonable suspicion at that point, it argues that the encounter remained consensual until Oetzel asked VanBeek to step out of the vehicle.

The Court of Appeals noted that the law recognizes three types of police-citizen encounters: (1) consensual encounters, which do not implicate the Fourth Amendment; (2) investigative detentions, which are Fourth Amendment seizures limited in scope and duration and which must be supported by reasonable suspicion of criminal activity; and (3) arrests, which must be supported by probable cause.

The State argues that the encounter remained consensual even after Oetzel asked for VanBeek's license. VanBeek argues once Oetzel took and retained the license, she was seized and reasonable suspicion was needed to make the seizure lawful, but both she and the State agree there was no reasonable suspicion at that point.

District II of the Court of Appeals has certified VanBeek's appeal to the Supreme Court, identifying the pertinent issue as:

> Whether a consensual encounter becomes an unconstitutional seizure under the Fourth Amendment when an officer requests and takes an individual's driver's license to the officer's squad car without reasonable suspicion.

WISCONSIN SUPREME COURT
February 23, 2021
10:45 a.m.

2019AP818 Southwest Airlines Co. v. Wisconsin Department of Revenue

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), that affirmed a Dane County Circuit Court order, Judge Richard G. Niess presiding, granting summary judgment in favor of the Wisconsin Department of Revenue.

Under Wisconsin law, "air carrier companies" are treated as utilities for ad valorem taxation purposes under Wis. Stat. § 76. All of their real and personal property is deemed to be personal property for taxation purposes. On or before May 1 of each year, air carrier companies are required to submit an annual report about their operations in the prior calendar year to the Department of Revenue (DOR), which the DOR then uses to assess state property taxes for the current year. The DOR assesses the total market value of the property of the air carrier company and then calculates the percentage of that assessment that should be attributed to Wisconsin.

The Wisconsin Legislature, however, created an exemption from these property taxes for air carrier companies that operate a "hub facility" in Wisconsin. Wis. Stat. § 70.11 intro and (42)(b). Section 70.11(42)(a)2. defines "hub facility" as follows:

> *2. "Hub facility" means any of the following:*
>
> *a. A facility at an airport from which an air carrier company operated at least 45 common carrier departing flights each weekday in the prior year and from which it transported passengers to at least 15 nonstop destinations, as defined by rule by the department of revenue, or transported cargo to nonstop destinations, as defined by rule by the department of revenue.*
>
> *b. An airport or any combination of airports in this state from which an air carrier company cumulatively operated at least 20 common carrier departing flights each weekday in the prior year, if the air carrier company's headquarters, as defined by rule by the department of revenue, is in this state.*

Air carrier companies seeking to invoke the "hub facility" exemption must submit their flight records to demonstrate that they meet the definition of "hub facility."

Southwest Airlines Co. and AirTran Airways, Inc. (collectively, the "Airlines") merged in 2011. Southwest was designated as the "acquiring or controlling carrier[.]" Southwest amended its Air Carrier Certificate on March 1, 2012, to include AirTran's operations. According to the Airlines, Southwest completed the transaction on May 2, 2011, at which time Southwest became the sole owner of the Air Carrier Certificates issued to each airline by the Federal Aviation Administration (FAA). Following the merger, however, the two airlines continued to schedule and publish their flights separately, and AirTran continued to fly under the AirTran name until December 2014.

In 2013 and 2014, Southwest and AirTran filed separate air carrier company reports with the DOR. For those assessment years, neither Southwest nor AirTran sought the hub facility exemption. Accordingly, neither submitted flight information to the DOR for those years.

During a DOR-initiated audit of the tax assessments for Southwest and AirTran, which included a review of flight data, the Airlines came to believe that they should have been viewed as a single air carrier company since the time of the merger and that their operations, when combined, met the requirements for the hub facility tax exemption for the 2013 and 2014 tax years. They requested that the DOR make adjustments to the information regarding their 2012 and 2013 operations contained in their original annual reports and determine that they qualified for the exemption for the 2013 and 2014 tax years.[1] The DOR denied their requests, concluding that even if viewed collectively, the Airlines did not meet the requirements for the exemption.

The Airlines filed the present case against the DOR in August 2017. Their complaint alleged that their aggregate flight data for 2012 and 2013 met the requirements for the hub facility exemption and that the property taxes they collectively paid for the 2013 and 2014 tax years (collectively, $4,177,574.00) should be refunded to them. Both sides filed motions for summary judgment.

The circuit court granted the DOR's summary judgment motion and denied the Airlines' motion. It concluded that the Airlines had not shown the minimum number of weekday flights required to qualify for the hub facility exemption.

The Airlines appealed. On appeal, they argued that they had "substantially" met the weekday flight requirement for the hub facility exemption.[2] As to why "substantial compliance" should be legally sufficient in this context, the Airlines pointed to the rule that tax exemption statutes should be given a "strict but reasonable" interpretation. Covenant Healthcare Sys., Inc. v. City of Wauwatosa, 2011 WI 80, ¶22, 336 Wis. 2d 522, 800 N.W.2d 906 ("Therefore, we apply a 'strict but reasonable' interpretation to tax exemptions statutes.").

The Court of Appeals affirmed the circuit court's summary judgment ruling. It rejected the Airlines' attempt to read the hub facility exemption statute to include a "substantial compliance" provision. Brauneis v. LIRC, 2000 WI 69, ¶27, 236 Wis. 2d 27, 612 N.W.2d 635 (courts "should not read into the statute language that the legislature did not put in"). The Court of Appeals stated that a plain language reading of the statute does not provide exceptions to the definition of a "hub facility," that it was bound by the statute as it is written., and that the undisputed evidence showed that the Airlines had not satisfied the number of weekday departing flights required to qualify for the hub facility exemption.

The Airlines successfully sought Supreme Court review, and present the following issues:

---

[1] Within four years from the date of the original annual report, air carrier companies may request the DOR to make adjustments to the data submitted by the air carrier company. Wis. Stat. § 76.075.

[2] For the 2013 tax year, the Airlines conceded that there were six weekdays during the 2012 calendar year in which they had not met the minimum 45 departing flight requirement. They contended, however, that their noncompliance on those days should not preclude their claim to the exemption because their failure to meet the 45-flight requirement on those weekdays had been due to the day being a holiday or to bad weather. For the 2014 tax year, they argued that they had complied with the weekday departing flight requirement because the average number of scheduled departing flights during 2013 had been higher than 45 per day.

1. Did the Airline qualify for the Hub Facility Exemption for the 2013 Assessment Year when, in the prior year, the Airline operated and flew common carrier departing flights on each and every weekday; operated and flew at least 45 common carrier departing flights on all but six weekdays that were adversely impacted due to weather and holidays (or 97 percent of weekdays); and/or scheduled more than 45 common carrier departing flights on 98 percent of the weekdays?
2. Did the Airline qualify for the Hub Facility Exemption for the 2014 Assessment Year when, in the prior year, the Airline scheduled and flew common carrier departing flights each and every weekday and scheduled an average of more than 46 common carrier departing flights on each weekday?
3. Are the general property tax provisions at Wis. Stat. § 70.11(intro), which requires a newly-exempt taxpayer to file a form with the local assessor to request an exemption, and Wis. Stat. § 74.35, which purports to be the exclusive procedure to claim an exemption, inapplicable to an air carrier company that qualifies for the Hub Facility Exemption?
4. In the absence of any other statutory-prescribed remedy, does Wis. Stat. § 76.075 provide the Airline with a procedure to request a refund when the statute allows the Department or a person subjected to tax under Chapter 76 to request an adjustment to the data submitted by the person at any time within four years?
5. Did the Airline's filing of annual reports for the 2012 and/or 2013 Assessment Years during a transitional period in Southwest Airlines' acquisition of AirTran Airways constitute a mistake of fact that bars application of the voluntary payment doctrine to deny the Airline's claim for refund?

WISCONSIN SUPREME COURT
February 25, 2021
9:45 a.m.

2018AP960 Country Visions Cooperative v. Archer-Daniels-Midland Co.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that affirmed in part and reversed in part an order of the Fond du Lac County Circuit Court, Judge Gary R. Sharpe, presiding.

In 2007, Golden Grain LLC and Agri-Land Coop (collectively, Golden) entered into a contract that gave Golden a right-of-first-refusal (ROFR) on a piece of real estate near Ripon owned at that time by Olsen Brothers Enterprises LLP (Olsen Brothers). The property, referenced here as the Ripon Property, included a large grain storage and transport facility, prime agricultural land that surrounded the grain facility, and access to rail lines. The ROFR provided that for a period of 10 years, Olsen Brothers was obligated to notify Golden if it received and wished to accept a "bona fide written offer" to purchase the Ripon Property. Such a notice would constitute an offer by Olsen Brothers to sell the Ripon Property to Golden "upon the terms set forth" in the offer.

The property and the ROFR both changed hands over the ensuing years. In July 2010, Olsen Brothers sold the Ripon Property to Paul and David Olsen individually. This sale did not trigger the ROFR. Within five months after that sale, however, Paul and David Olsen each filed for bankruptcy. The bankruptcy court handling their bankruptcies approved the sale of the Ripon Property out of the bankruptcy estates to Archer-Daniels-Midland Company (ADM) "free and clear of all Claims, Encumbrances (other than Permitted Encumbrances) and Liabilities." The bankruptcy sale did not give any effect to the ROFR. Golden never received notice of the sale nor did Golden representatives attend the bankruptcy court confirmation hearing for the sale.

At around the time of the Olsen bankruptcies, a series of assignments and mergers among the original ROFR holders also occurred. Ultimately, the ROFR was transferred to Country Visions Cooperative (Country Visions).

In May 2015, ADM started negotiations to sell its Wisconsin grain business assets to United Cooperative (United). Those negotiations resulted in an asset purchase agreement (APA) executed in September 2015. Under the APA, ADM agreed to sell the Ripon Property and three other Wisconsin grain storage facilities to United for a total price of $25 million. The APA allocated, for accounting purposes, just under $14.6 million to intangible rights and personal property and just over $10.4 million to the real property (i.e., all four parcels of real estate).

ADM did not give Country Visions notice of the APA. Country Visions learned of the APA and advised ADM that it held a ROFR on the Ripon Property. At that point, ADM and United attempted to separate out the sale of the Ripon Property from the sale of the three other parcels and of the business assets of all four facilities. In October 2015, ADM and United entered into a Commercial Offer to Purchase the Ripon Property, which purported to set the sale price for that parcel at $20 million. The agreement acknowledged that the Ripon Property was subject to Country Visions' ROFR, but it contained no other contingencies. The very next day, ADM and United entered into a second contract, pursuant to which ADM would sell the other three properties and the business assets of all four properties to United for $5 million.

ADM forwarded the accepted Offer to Purchase the Ripon Property to Country Visions. That triggered the window for Country Visions to exercise its ROFR. Country Visions did not exercise its right. On October 16, 2015, ADM and United closed on the $5 million deal for the other real estate and the business assets. When the ROFR period expired with no matching offer from Country Visions, ADM and United closed on the sale of the Ripon Property in early November 2015.

Country Visions sued both ADM and United. It sought specific performance of its ROFR at the fair market value of the Ripon Property, as well as an award of damages. Its complaint alleged that the transactions between ADM and United were a sham intended to preclude it from exercising its ROFR. ADM and United denied the allegations of the complaint.

After issuing a number of pretrial rulings, the circuit court held a bench trial and issued a written decision that ultimately found that United had assigned an arbitrary value of $20 million to the Ripon Property and that its offer to purchase at that price had been a "sham" at a price "well beyond" any of the valuations presented at the trial. The circuit court found that the inflated price of $20 million for the Ripon Property had been adopted for the purpose of preventing Country Visions from exercising its ROFR. The court also found that the $5 million price for the rest of the property had been wholly insufficient to provide reasonable consideration for the three other parcels and personal property. It pointed to the fact that the defendants' expert had opined that those parcels were worth $8.4 million.

The circuit court considered the appropriate price at which Country Visions should be given the opportunity to exercise its ROFR on the Ripon Property. It relied on Wilber Lime Prods, Inc. v. Ahrndt, 2003 WI App 259, ¶¶8-14, 268 Wis. 2d 650, 673 N.W.2d 339, which provides that where a property subject to a ROFR is part of a proposed larger transaction involving other properties, a court should determine what portion of the proposed purchase price is properly allocable to the property subject to the ROFR and set the subject property's price at the actual "fair market value."

There was a dispute in this case as to what constituted the Ripon Property's "fair market value," and whether the unique value the property might have to United[1] should be considered in determining its fair market value for purposes of the ROFR. The circuit court found that the value of the Ripon Property should include consideration of its unique synergies with United's other nearby grain storage facilities. Adopting the ADM/United expert's valuation for the most part, the circuit court set the exercise price of the ROFR at $16.6 million. It gave Country Visions 15 days to exercise the ROFR at that price. This time period was subsequently stayed pending appeal.

Although the ROFR is therefore still "pending," the circuit court also addressed the potential damages that could compensate Country Visions for its lost profits from the date of the breach of the ROFR to the date of the specific performance order. Because Country Visions' CEO had testified that his cooperative would not have paid more than $8-$9 million for the Ripon Property, the circuit court concluded that Country Visions would not have exercised its ROFR at the proper value of $16.6 million. Consequently, the court declined to award compensatory damages to Country Visions based on its lost profits. The court did, however, find

[1] The expert for United and ADM testified that the Ripon Property would have a higher than normal value for United because only United could add the storage and shipping capacity of the Ripon Property to other nearby properties in order to transport grain in 100-car trains, which would afford United economic efficiencies that other buyers could not achieve.

that Country Visions should be awarded some damages in the event that the appellate courts upheld its determination that ADM and United had artificially inflated the price allocable to the Ripon Property in a sham transaction. The court ruled that the damages should be the amount of profits that United had earned between the time of the sham offer and the time of trial. The court relied on the testimony of Country Visions' expert to set this amount at $2 million. Finally, the circuit court declined to award any punitive damages.

Both sides challenged portions of the circuit court's rulings and findings on appeal. ADM and United challenged the circuit court's ruling that the $20 million offer to purchase the Ripon Property was a sham. They argued that the offer could not have been a sham because the $20 million offer price was less than 20% above what the circuit court ultimately determined was "fair market value" and that their expert had testified that the property was worth at least $20 million to United. Further, they pointed to the fact that they had separated the sale of the four parcels and the business assets into two separate transactions and had closed on the sale of the other three parcels and the other business assets first. Therefore, they claimed that the $20 million offer could not have been an inflated sham because United could have backed out on the Ripon Property sale after obtaining the rest of the assets at an artificially low price.

ADM and United also challenged the circuit court's decision to give Country Visions an opportunity to exercise the ROFR at a court-established price. They argued that this remedy was not appropriate because Wilber Lime was not applicable since the Ripon Property ultimately had been sold separately rather than as part of a larger transaction.

On the other hand, Country Visions challenged the circuit court's determination of the price at which it would be allowed to exercise it ROFR. It argued that it was error for the circuit court to rely on an income-based valuation methodology and that the circuit court should have followed the three-tier methodology for determining "fair market value" in tax assessment cases.

The Court of Appeals affirmed the circuit court's judgment, with one relatively small exception. It upheld the circuit court's finding that the offer to sell the Ripon Property for $20 million had been a sham and its ruling that the proper remedy in these circumstances was to give Country Visions the opportunity to exercise the ROFR at the "fair market value" of the Ripon Property. It also rejected Country Visions' argument that the circuit court was obligated to follow the three-tier valuation methodology in setting the ROFR exercise price. The Court of Appeals ruled that it had been proper for the circuit court to take into account the unique reasons that United had for valuing the Ripon Property more highly than other buyers. The Court of Appeals, however, concluded that the circuit court may have erred in one respect in setting the price at which Country Visions could exercise the ROFR. It agreed with Country Visions that the value set for the Ripon Property appeared to include not only the real estate but also the value of all of the personal property necessary to run a grain storage and transport business on that site. Since the ROFR was only for the real estate, the Court of Appeals remanded the case to ensure that the ROFR price represented the fair market value for just the real estate at the Ripon Property.

Country Visions successfully petitioned the Supreme Court for review. Its petition presents the following single issue for review:

> Whether a property subject to a right of first refusal, when sold with other property not subject to that right, should be valued based on its market value, as the term "market value" has been traditionally defined by Wisconsin case law.

WISCONSIN SUPREME COURT
February 25, 2021
10:45 a.m.

No. 2019AP894 Eau Claire County Department of Human Services v. S.E.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), that affirmed a nonfinal order of the Eau Claire County Circuit Court, Judge Emily M. Long presiding, in a termination of parental rights proceeding that denied S.E.'s motion for an order that would require the Eau Claire County Department of Human Services to prove elements of the continuing Child In Need of Protection or Services (CHIPS) under a previous version of the CHIPS statute.

In June 2016, S.E.'s three-month-old son was removed from S.E.'s home pursuant to a temporary physical custody order. The initial Child In Need of Protection or Services (CHIPS) order contained a written notice of potential grounds for termination of S.E.'s parental rights, including the ground of "continuing CHIPS," as set forth in Wis. Stat. § 48.415(2)(a). Section 48.415(2)(a) contained four elements that had to be met in order for a parent's rights to be terminated. At the time of that initial CHIPS order, the fourth element of § 48.415(2)(a) required that the petitioner show that there was "a substantial likelihood that the parent [would] not meet [the] conditions [established for the safe return of the child to the parent's home] within the 9-month period following the fact-finding hearing." Wis. Stat. § 48.415(2)(a)3. **(2015-16)** (the "9-month failure to meet requirement"). The circuit court subsequently issued additional orders extending the CHIPS order for S.E.'s son in 2016, 2017, and 2018.

Effective April 6, 2018, the Legislature amended Wis. Stat. § 48.415(2)(a)3. See 2017 Wis. Act 256, § 1. The amendment eliminated the 9-month failure to meet requirement and replaced it with the following new fourth element of continuing CHIPS:

> [I]f the child has been placed outside the home for less than 15 of the most recent 22 months, [the petitioner must show] that there is a substantial likelihood that the parent will not meet the[] conditions [established for the safe return of the child to the parent's home] as of the date on which the child will have been placed outside the home for 15 of the most recent 22 months, not including any period during which the child was a runaway from the out-of-home placement or was residing in a trial reunification home.

Wis. Stat. § 48.415(2)(a)3. **(2017-18)** (the "15-out-of-22-month timeframe").[4]

In June 2018, shortly after the amendment took effect, the Eau Claire County Department of Human Services filed its initial Termination of Parental Rights (TPR) petition, which alleged only abandonment as the ground for the termination of S.E.'s parental rights to her son. In September 2018, the County DHS filed an amended petition that added continuing CHIPS as a ground for termination.

[4] The other three elements of continuing CHIPS were not altered by 2017 Wis. Act 256.

At a status conference in April 2019, before the TPR grounds trial was to occur, the parties disputed which version of the continuing CHIPS ground (the 9-month failure to meet requirement or the 15-out-of-22-month timeframe) the County DHS would need to prove. S.E. filed a written motion asking for a ruling that the 9-month-failure-to-meet requirement be used for the grounds trial. After receiving responses in opposition by the County DHS and the guardian ad litem (GAL) and hearing oral arguments from the parties, the circuit court ruled that the 15-out-of-22-month timeframe version of the continuing CHIPS ground would apply to the TPR grounds trial.

S.E. filed a petition for leave to file an interlocutory appeal, which the Court of Appeals granted. Consequently, the grounds trial did not take place.

While S.E.'s appeal was pending, a different panel of the Court of Appeals issued its decision in Dane Cty. Dept. of Health Servs. v. J.R., 2020 WI App 5, 390 Wis. 2d 326, 938 N.W.2d 614. The Court of Appeals in S.E.'s case relied on its decision in J.R. to foreclose a number of S.E.'s arguments on appeal. First, S.E. argued that applying the amended version of the continuing CHIPS ground would constitute a retroactive application of the amended statute, which would impair her vested right to parent her child and her due process right to "fair notice". The Court of Appeals pointed to its decision in J.R., where it had determined that the amended version of the statute did not operate retroactively. Because it had previously addressed as-applied due process challenges in J.R., it also rejected S.E.'s similar as-applied challenges.

However, S.E. raised additional as applied due process challenges that had not been made in J.R.—namely, that applying the amended version of the statute would be fundamentally unfair because the state had substantially changed the type of conduct that may lead to the loss of parental rights without given the parent sufficient notice of the change. The Court of Appeals acknowledged that due process is implicated in TPR proceedings because the state is seeking to destroy familial bonds and therefore it must "provide parents with fundamentally fair procedures." Steven V. v. Kelly H., 2004 WI 47, ¶25, 271 Wis. 2d 1, 678 N.W.2d 856 (quoting Santosky v. Kramer, 455 U.S. 745, 753-54 (1982)). The fundamentally fair procedures required include using a "clear and convincing evidence" burden of proof and providing fair notice of any substantive change to a parent's conduct that could lead to a termination of the parent's rights. See State v. Patricia A.P., 195 Wis. 2d 855, 863, 537 N.W.2d 45 (Ct. App. 1995). The Court of Appeals, however, concluded that the amendment of Wis. Stat. § 48.415(2)(a)3. had not substantially changed the nature of the conduct that might lead to a termination of S.E.'s parental rights.

Finally, S.E. raised a statutory interpretation argument that had not been raised in J.R. She argued that under the plain meaning of the amended version of Wis. Stat. § 48.415(2)(a)3., the 15-out-of-22-month timeframe begins when a CHIPS order containing that specific warning is issued. The Court of Appeals concluded that the plain meaning of the amended version of the statute did not support this interpretation.

Ultimately, the Court of Appeals affirmed the circuit court's pretrial order and remanded the case back to the circuit court to proceed with the grounds phase evidentiary hearing.

S.E. petitioned the Supreme Court, which granted review. S.E. raises the following issues:

1. Whether as a matter of statutory construction the new, shorter timeframe begins with the initial CHIPS order, even if it predates the change in the statute and thus does not include notice of the shorter timeframe.

2. Whether starting the shorter timeframe with a CHIPS order that predates the statutory change violates a parent's due process rights.